Statement for the Hearing "Patent Reform: Protecting American Innovators and Job Creators from Abusive Patent Litigation"

Before the House of Representatives
Judiciary Committee

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Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee, I am Mark Griffin, General Counsel of Overstock.com, Inc. Thank you for the opportunity to testify before you today on behalf of Overstock, and United for Patent Reform, about protecting American innovators and job creators from abusive patent litigation.

About Our Company

As the twentieth century drew to a close, online shopping was just beginning to emerge. In early 1999, Dr. Patrick Byrne, the founder of Overstock.com, recognized that the Internet presented the ideal platform for liquidating excess inventory. Until the advent of online retail, smaller businesses had no efficient "close-out" merchandising process, and customers looking for bargains had to traipse to brick-and-mortar outlet centers with limited selections. And so, in October of 1999 in Salt Lake City, Utah, with no outside funding and with real innovative vision, Dr. Byrne launched Overstock.com, the premier online business, providing excess inventory to retail consumers at significant savings.

Our website gives customers a simple and convenient way to shop for quality products at the best prices, 24 hours a day -- with a broad selection of more than a million products on the site. We have grown from a handful of employees and suppliers in 1999 to roughly 1,500 employees and over 3,200 suppliers today. We not only deal in discounted, closeout merchandise, but also value-priced brand products of all shapes and sizes, including, furniture, home decor, housewares, bedding and bath, consumer electronics, apparel, jewelry, sporting goods, books, DVDs, and video games. We built our brand on first-rate customer service, and it's paid off: Since 1999 we have grown in revenue from $1.8 million, to $1.3 billion last year. The Overstock.com story exemplifies what is best in the American Innovative Spirit.

About United for Patent Reform

United for Patent Reform is a broad coalition of diverse American businesses who are pursuing comprehensive solutions to abusive patent litigation. Instead of creating new jobs and investing in new technologies, businesses, large and small, across many industries from national realty, construction, auto manufacturers and technology businesses to Main Street retail shops, hotels, grocers, convenience stores, and restaurants, are diverting precious resources to settle with or fight patent trolls.

Our Experience With Patent Assertion Entities

At Overstock.com, we know tech innovation. Dr. Byrne frequently observes that when we started, "We were a lemonade stand, stapled to a small computer; and now we are the opposite: a big computer stapled to a lemonade stand." We thrive on useful, proper innovation. We have to innovate to survive. We are a strong respecter of intellectual property. We own patents ourselves, and we license technologies we need from inventors; we spend a

fair amount of our budget each year buying and licensing intellectual property necessary to our operations. Technology and intellectual property are at the center of our business.

But we also know what abuse of innovation is: It is patent trolls trying to extort money from productive and profitable businesses by suing on weak, vague patents, and banking on the notion that so many of their litigation victims will settle rather than defend themselves, because patent litigation defense is brutally expensive. Overstock.com is not one of those victims. We firmly believe that feeding abusive trolls only attracts more trolls. We follow a "spend and defend" strategy -- we would rather pay real dollars in high defense costs than give a dime to abusive patent trolls.

Since 2004 we have been sued 32 times for patent infringement, and we have spent approximately $11 million to defend these actions. Our lawyers are among the most effective in the business, but they are also efficient and economical; I have no doubt that similarly-situated companies elsewhere pay much higher legal defense fees. And so you can see why so many of them do not want to pay high defense costs; in the short run, it is cheaper and less risky to pay the troll to go away. But the trolls never actually go away. We have in our history settled a handful of cases for small values, though our experience in those cases only reinforced our belief that litigating every unjust assertion of patent infringement is the better strategy.

While expensive, our fighting strategy has proved to be a good investment. Three of our cases were dismissed by the courts during pre-trial motion practice. We won a large case in 2011, invalidating the troll's principle patent. As a result of our approach and the fighting reputation we have earned, with increasing frequency, patent trolls simply dismiss their cases against us when they discover that we intend to fight, rather than settle. In the last three years, for example, 12 trolls have dismissed their cases against us—simply walked away with no settlement payment of any kind. When they want us not to publicize the dismissals, we often refuse. We want everyone to know that trolls leave empty-handed, without a dime of the money that we would rather spend building our business. As Patrick Byrne said last year, when two of those trolls, Execware and Eclipse, walked away from us empty-handed and a bit bruised: "In abusive lawsuits, we spend our legal budget in defense, not on unjust settlements."

While it is rewarding to see this approach pay dividends for us, many other retailers and others who receive frivolous patent demands cannot afford to spend tens of millions of dollars to scare trolls off the bridge. Moreover, a well-functioning patent system should not impose this kind of tax on innocent operating companies. Congressional action establishing national litigation standards applicable in all federal courts can help to reduce the burden of abusive patent litigation and deter abusive practices, so that each company does not need to individually bear the great expense of standing up against trolls on its own.

Legislative Reform

We have heard about a number of possible reforms to the litigation system that would make it less attractive to trolls. Multi-faceted reform would help cure the economic asymmetries that make their extortionate approach profitable against the many companies that lack the resources and the will to stand up to trolls.

First, we believe it is crucial to raise the pleading standards in patent litigation, to make trolls explain their infringement claims in more detail when they file a complaint. Currently, courts do not require that a patent holder explain how a patent is infringed, or even identify the product involved, which makes it nearly impossible for someone who has been sued to evaluate the case and decide how to respond. Adding to the difficulties of a legitimate company facing such a vague lawsuit, trolls can then demand vast amounts of discovery, which is burdensome and very expensive for the defendant. The trolls then have more leverage to extort a settlement, and companies will often settle a case just to avoid those discovery costs -- without ever really knowing whether the suit had any merit at all. Genuine notice pleading, as we have in other areas of the law, will allow defendants to determine what exactly is alleged to infringe and make an informed decision as to how to best proceed with the case, and it will remove one unfair advantage from the trolls' arsenal.

Second, in patent litigation, we need a pecking-order priority between those who merely use an alleged infringing product and those manufacturers or suppliers from whom the user purchases. Patent trolls often prefer to file suits against end-user customers for a technology these customers purchased, but did not manufacture. It is imperative that that claims of infringement proceed first between a patent owner and a manufacturer, before claims are allowed to proceed between the patent owner and the manufacturer's customers. Under current law, anyone can be sued for infringement for using a product, system or method. We don't want to change that. Instead, it simply makes sense for cases against end-users to be stayed in favor of cases involving the manufacturer. Trolls often pick on users of products rather than manufacturers because users are easier targets—the users, not being the original producer, often lack access to the information to form a proper defense. They may not even know that they are using a patented product, and they likely have less familiarity with the patent litigation system than a manufacturer of patented products does. And trolls not only target users, they often target users that are small businesses, who lack not only the information and experience to take on a patent infringement suit, but the legal staff and financial resources. Besides, as long as trolls can sue users and avoid the manufacturers, they stand to garner many unjust settlements without any real risk of having weak infringement claims vigorously contested.

Third, we need a better discovery process. Patent trolls exploit the discovery process to drive up costs, making settlement the less costly option for a troll target. They make extraordinarily broad claims about a patent's scope, and then make correspondingly extensive claims for very

far-reaching discovery. Not only do they put the defendant company to extraordinary costs, but they risk nothing in return, for they make no products and document nothing but their litigation. Legislation should make patent litigation more efficient so that weak cases can be dismissed before too much expensive discovery. For example, requiring patentees to explain, and judges to decide, what a patent means—at the *Markman* hearing—before the majority of discovery would drive early resolutions and avoid unnecessary costs. Indeed, trolls will sometimes drop cases at the *Markman* stage, if their broad and spurious claims are rejected by the judge, and even if they are not, a claim construction before massive discovery will still narrow the issues and focus the case, which promotes quicker and more effective resolutions, often by summary judgment.

Fourth, we need reasonable cost constraints in discovery. For example, trolls should pay for the broad discovery they request, beyond core documents, so that they cannot unjustly ramp defense costs to force settlement. Since trolls don't actually make or create anything, they have few documents to produce. Consequently, most case discovery is one-sided and there is no troll incentive to be reasonable in discovery requests. But only a very few of the thousands of documents routinely produced in troll litigation are ever actually relevant to the dispute, and in today's world of e-discovery and massive record-keeping this all translates to an enormous bludgeon in a troll's hands. Making trolls responsible for the costs of their discovery requests that go beyond the documents needed to decide most patent issues, will stop unreasonable demands made solely for negotiation leverage. And all these decisions could -- and should -- remain squarely within the district court's discretion in managing a case, to ensure that legitimate discovery requests by any party are accommodated.

Lastly, we need better cost-shifting options for judges. Trolls currently have few barriers to litigation with no significant costs. Defendants, on the other hand, face astronomical fees to battle a troll in court: $6 million in legal fees for a large company, and $1 million for a small one, are the cost of doing business in this arena. But trolls face no such risks, and are often set up precisely to be judgment-proof. A stronger fee-shifting statute, and a mechanism to ensure court-ordered fee shifting is enforceable, will strongly deter nuisance suits without any chilling of legitimate suits. Patent law currently allows for fee shifting, and the *Octane Fitness* decision is a helpful step forward in defining "exceptional" cases. It is important, however, that Congress speaks to fee shifting in statute, and give judges better options to deter the rising tide of frivolous troll litigation. Where a suit is truly frivolous, the defendant should be able to seek reimbursement of its reasonable defense costs; no legitimate patent holders need fear such a standard, while the mechanism will surely deter the types of cases trolls routinely file.

An Escalating Problem

Opponents of patent reform claim patent infringement filings are going down, but evidence shows that a record number of patent cases have been filed in recent years. In 2013, that number reached a record high, having increased by 25%.[1] On April 23, 2014, more new patent lawsuits were filed on a single day than on any other day in at least the last 14 years.[2] And so far in 2015, patent lawsuit filing has surged. There were 36% more patent cases filed in January of this year than January of last year[3], and 499 patent litigation cases were filed in February, marking the third straight month-on-month increase in patent lawsuit filing.[4] And to be clear, the alarming majority of these cases are not filed by innovators or owners of patents that they are enforcing in the marketplace; they are filed by trolls, seeking to extract value not by productive use or licensing of patents, but by litigation. Last year, non-practicing entities accounted for 63% of all the patent cases filed.[5] In January of this year, more troll cases were filed than in all of 2004. This is an abuse of the system, and it is escalating. The time is now for meaningful patent reform.

Conclusion

Overstock appreciates Congress' efforts to come to a bipartisan resolution that curbs abuse of the patent system. Considering the significant litigation expenses that Overstock has paid fighting abusive patent litigation, Overstock supports your efforts to help return the rewards of innovation and effort to those who are actually bringing jobs to American workers, and goods to American consumers. The only people who benefit from frivolous patent litigation are the trolls and their lawyers, and that benefit is not enumerated among the original aims of our patent system.

Again, I am honored to have the opportunity today to present our company's experiences which bear on the important questions before you. As you deliberate and discuss the means to fairly adjust the machinery of patent litigation, please remember our voice and the voice of other U.S. retailers. Thank you.

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[1] Price Waterhouse Coopers, "2014 Patent Litigation Study," July 2014, http://www.pwc.com/us/en/forensic-services/publications/2014-patent-litigation-study.jhtml

[2] Ryan Davis, "Draft Patent Troll Bill Spurs Huge Spike in New Suits," Law360, May 2, 2014, http://www.law360.com/articles/533893/draft-patent-troll-bill-spurs-huge-spike-in-new-suits

[3] Lex Machina blog, February 5, 2015 , "Patent case trends and the business of litigation"

[4] Michael Loney, "US Patent Litigation Surges in February, Driven by Software Cases," Managing Intellectual Property, March 10, 2015, http://www.managingip.com/Article/3434536/US-patent-litigation-surges-in-February-driven-by-software-cases.html

[5] RPX Blog on 2014 data, January 9, 2015, "New and Smaller Targets"